

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000215-001 DT

06/06/2005

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

ALEX FAGAN JR.

DARROW K SOLL

v.

JAMES BLAKE (001)
STATE OF ARIZONA (001)

JAMES BLAKE
SCOTTSDALE MUNICIPAL COURT
3700 N 75TH STREET
SCOTTSDALE AZ 85251
KENNETH M FLINT

MINUTE ENTRY

This Petition for Special Action has been under advisement since the receipt of supplemental memoranda. This Court has considered and reviewed the record of the proceedings from the Scottsdale Municipal Court and the excellent pleadings, memoranda and oral arguments submitted by counsel.

1. Jurisdiction

This Court has jurisdiction over special actions pursuant to the Arizona Constitution Article, VI, Section 18, and Rule 4(b), Arizona Rules of Procedure for Special Actions.

The exercise and acceptance of special action jurisdiction in this case is highly discretionary,¹ and therefore, the decision to accept jurisdiction encompasses a variety of determinants.² Acceptance of special action jurisdiction is appropriate where an issue is one of first impression regarding a purely legal question, is of statewide importance, and is likely to arise again. In this matter, special action jurisdiction will be exercised to resolve a purely legal

¹ *Blake v. Schwartz*, 202 Ariz. 120, 42 P.3d 6 (App. 2002); *Haas v. Colosi*, 202 Ariz. 56, 40 P.3d 1249 (App. 2002).

² *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, 6 P.3d 323 (App. 2000).

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question of whether the Real Party In Interest, Alex Fagan, Jr., is entitled to a jury trial for the misdemeanor offenses of assault, disorderly conduct and threatening and intimidating. Moreover, there is a clear issue presented here of county-wide importance to all limited jurisdiction courts, that is likely to arise again. This Court will accept special action jurisdiction in this case.

2. Factual and Procedural Background

This is a Special Action Petition from the Scottsdale Municipal Court. The only issue presented in this case is whether the trial judge (the Honorable James Blake, Scottsdale Municipal Court Judge, who is a Respondent herein) erred in denying Alex Fagan, the Real Party In Interest, a jury trial for misdemeanor charges. The State has charged Alex Fagan with 3 counts of assault, in violation of A.R.S. § 13-1203(A)(1), 1 count of disorderly conduct, in violation of A.R.S. § 13-2904, 1 count of criminal damage in violation of A.R.S. §13-1602(A)(1), and 3 counts of threatening and intimidating in violation of A.R.S. §13-1202(A)(1). On February 18, 2005, counsel for Petitioner filed a Memorandum in Support of Demand for Jury Trial and this motion was denied by the Honorable James Blake on March 8, 2005. Attorneys for Petitioner then commenced this Special Action.

3. Issue Presented in this Case

The Petitioner asserts in this Special Action Complaint that the Real Party In Interest, Mr. Fagan, had an absolute right to a jury trial for misdemeanor offenses prior to statehood by Arizona common law. Petitioner therefore argues that Article II, Section 23 of the Arizona Constitution grants a constitutional right to a jury trial for the charged misdemeanor offenses. The, Petitioner requests that this Court order the Honorable James Blake to grant the Petitioner's Memorandum in Support of Demand for Jury Trial pursuant to *Derendal v. Griffith*.³

4. Discussion of the Issue

Recently, the Arizona Supreme Court announced its decision in *Derendal v. Griffith*.⁴ There, the court was asked to consider whether Arizona should retain the previous test set out in *Rothweiler v. Superior Court*,⁵ to determine when the Arizona Constitution mandates that a criminal offense be eligible for trial by jury. In *Rothweiler*, the court fashioned a test to determine whether a Defendant is entitled to a jury trial in a particular criminal offense. Under that test, the court looked to: (1) the relationship of the offense to the common law crimes; (2)

³ 209 Ariz. 416, 104 P.3d 147 (Ariz. 2005).

⁴ *Id.*

⁵ 100 Ariz. 37, 410 P.2d 479 (Ariz. 1966), *overruled in part*.

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the severity of the statutory penalties that apply; and (3) the moral quality of the act.⁶ In *Derendal*, the court modified the test by eliminating the moral quality prong. The court held that the current analysis of jury trial eligibility of misdemeanor offense requires a two step process. First, the court must determine whether a statutory offense has a common law antecedent that guaranteed a right to a trial by jury at the time of Arizona statehood.⁷ If so, the inquiry concludes. If there is no common law antecedent for which a jury trial was required, the court must determine whether the offense is “serious” enough to warrant a jury trial.⁸

A. The Right to a Jury Trial for Assault Cases at Common Law in Arizona

Article II, Section 23 of the Arizona Constitution provides that the right to a jury trial “shall remain inviolate”, and preserves the right to a jury trial as it existed at the time Arizona adopted its constitution.⁹ Jury eligibility is firmly linked to an offense’s common law status, not a pre-statehood statutory entitlement. Thus, the constitution requires that the state guarantee the right to a jury trial to a defendant where the offense charged was granted a jury trial at common law prior to statehood.¹⁰

Where the right to a jury trial existed for an offense prior to statehood, the right cannot be denied for modern statutory offenses of the same “character or grade.”¹¹ To constitute a common law jury-eligible offense as an antecedent to a modern offense, the modern offense must contain elements comparable to those found in the common law offenses. Mere similarity of the modern crime to a common law offense, without regard to the common law jury eligibility of that offense, is not enough.¹² Likewise, similarity between the modern offense and another modern offense for which a jury eligible common law antecedent exists is also not enough. Rather, to be jury trial eligible, the modern offense must have substantially similar elements to a common law offense that was itself jury trial eligible.

(1) The Right to a Jury Trial Prior to Arizona Statehood

Arizona’s misdemeanor assault statute, A.R.S. § 13-1203, and the disorderly conduct statute, A.R.S. § 13-2904, have direct antecedents in Arizona territorial law. The Howell Code was the first codification of law in the Arizona Territory. The Howell Code first defined the terms “assault” and “battery” as follows:

⁶ *Id.* at 42.

⁷ *Derendal*, 104 P.3d at 156.

⁸ *Id.*

⁹ *Derendal*, 104 P.3d at 150.

¹⁰ *Id.*

¹¹ *Id.* (quoting *Bowden v. Nugent*, 26 Ariz. 485, 491, 226 P. 549, 551 (Ariz. 1924)).

¹² See *Derendal*, 104 P.3d at 156; *Donahue v. Babbitt*, 26 Ariz. 542, 550, 227 P. 995, 997 (1924); *State v. Harrison*, 164 Ariz. 316, 319, 792 P.2d 779, 782 (App. 1990).

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Section 49. An Assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another.¹³

Section 51. Assault and battery is the unlawful beating of another, and a person duly convicted thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year.¹⁴

Identical language to this provision also appeared in subsequent revisions of the Arizona Code. The Penal Code of 1887 retained the same definition of assault in Section 383. Moreover, Section 384 now defined “battery” and “assault” as follows:

Section 384. A Battery is any willful and unlawful use of force or violence upon the person of another.¹⁵

Section 386. An assault or battery may be committed by the use of any part of the body of the person committing the offense as of the hand, foot, head or by the use of any inanimate object¹⁶

The 1901 Penal Code retained the same definitions as the 1887 Penal Code. The language used in the 1913 Penal Code also remained largely the same, defining misdemeanor assault as “an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another”¹⁷ and battery as “any willful and unlawful use of force or violence upon the person.”¹⁸ The previous provisions remained essentially unchanged through a number of statutory enactments.¹⁹ The current version of the assault statute, A.R.S. § 13-1203, currently reads as follows:

A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

¹³ The Howell Code, Chapter X, § 49 (1864).

¹⁴ The Howell Code, Chapter X, § 51 (1864).

¹⁵ Penal Code, § 384 (1887).

¹⁶ Penal Code, § 386 (1887).

¹⁷ Penal Code, § 207 (1913).

¹⁸ Penal Code, § 209 (1913).

¹⁹ See Arizona Laws, 1901, 1913, 1928, 1939, and 1969.

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It is also clear that Arizona territorial law liberally granted an absolute right to a jury trial for all criminal offenses. In 1863, the United States Congress established Arizona as a Territory. Article 8 of the Territorial Bill of Rights, adopted on October 4, 1864, provided:

The right of trial by jury shall be secured to all, but a jury trial may be waived by parties in civil cases in the manner prescribed by law.

Similarly, the 1887 Penal Code also guaranteed every person the right to a jury trial for all public offenses:

Section 14. No person can be convicted of a public offence, unless by a verdict of a jury accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer to the indictment in the case, mentioned in this chapter.²⁰

Identical language to this provision appeared in each of the three subsequent revisions of the Arizona Code. The Howell Code also contained the following provision, hand-written by the scrivener, regarding the conduct of misdemeanor jury trials:

Sec. 1582. Issues of fact must be tried by Jury unless a trial by jury be waived in criminal cases not amounting to felony by consent of both parties expressed in open court and entered in its minutes. In cases of misdemeanor the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court.²¹

From these authorities, I conclude that the statutory right to a jury trial existed in Arizona for all misdemeanor and felony offenses prior to, and at the time of statehood. And, from the exhibits offered by the Petitioner, I find irrefutable evidence that jury trials were regularly held for such misdemeanor offenses as simple assault and disorderly conduct in Arizona between the years of 1887 and 1911.²² It is quite clear from the hand-written records (attached as exhibits to the Petitioner's brief) from the clerks of the various courts throughout Arizona prior to statehood, that jury trials for misdemeanor offenses were regularly held. However, I find that such

²⁰ The Howell Code, Chapter XI, Part I, § 14.

²¹ Penal Code, Chapter VI, § 1582 (1887).

²² The Petitioner argues that this court should find that the Howell Code provisions cited in this opinion, formed the basis of the common law provision within Article II, Section 23 of the Arizona Constitution granting the right to a trial by jury, as the right was widely construed at the time of statehood, and that over the years, Arizona courts have misconstrued and improperly limited the right to jury trial to offenses that are not deemed petty under the authority of *Goldman v. Kautz*, 111 Ariz. 431, 531 P.2d 1138 (1975). However, this court is without authority (or inclination) to disregard a published opinion from a higher court. I therefore reject Petitioner's invitation to find constitutional authority for misdemeanor jury trials within Arizona's Constitution.

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misdemeanor jury trials were held pursuant to statutory authority, rather than common law authority.

(2) There Are No Common Law Antecedents. If a defendant had a right to a jury trial under the common law at the time the Arizona Constitution was adopted, that right was preserved by the Arizona Constitution. As previously noted, *Derendal* makes clear that in order to qualify for jury trial eligibility, a modern offense must have a clear link to a common law offense in either exact or same grade/character. Case law illustrates that Arizona has long used broad common law concepts transported from England, as amended by parliamentary statute, as the benchmark for Arizona's common law.²³ Common law is not the statutory Arizona Territorial law as it existed when the Arizona Constitution was adopted. Rather, the common law in Arizona is viewed as "the ancient, nonstatutory law of England as applied and developed in the English courts [and] . . . English statutes amending this law."²⁴

At common law, a criminal assault was an unlawful attempt to do bodily harm to another. Justices of the Peace had jurisdiction at common law prior to 1776 to punish simple assaults and batteries without a trial by jury.²⁵ In *State v. Maier*, the court noted that "there can be no doubt of the justice of the peace at common law before 1776 to punish common or simple assaults and batteries summarily without presentment or indictment and without trial by jury."²⁶ The Arizona Supreme Court has consistently agreed with this conclusion by acknowledging that at common law, misdemeanor assault was the equivalent of simple battery, and it did not require a jury trial.²⁷

Finally, regarding disorderly conduct, no such offense even existed at common law.²⁸ Arizona courts have distinguished between disorderly conduct and breach of the peace:

Unlike the offense of disorderly conduct, which is a creature of statute, breach of the peace has its roots in the common law. 12 Am.Jur.2d *Breach of Peace and Disorderly Conduct* §§ 1, 24. The two concepts overlap but are distinguishable, *id.*, and "while disorderly conduct can include breach of the peace, breach of the

²³ See *Patterson v. Connolly*, 51 Ariz. 443, 445, 77 P.2d 813, 814 (1938); *Masury & Son v. Bisbee Lumber Co.*, 49 Ariz. 443, 68 P.2d 679 (1937).

²⁴ *Hoyle v. Superior Court*, 161 Ariz. 224, 228, 778 P.2d 259, 263 (App. 1989).

²⁵ *State v. Maier*, 13 N.J. 235, 278, 99 A.2d 21 (1953).

²⁶ *Id.* at 250.

²⁷ *Bruce v. State*, 126 Ariz. 271, 614 P.2d 813 (1980); *Goldman v. Kautz*, 111 Ariz. 431, 531 P.2d 1138 (1975); *O'Neill v. Magnum*, 103 Ariz. 484, 445 P.2d 843 (1968).

²⁸ *Dunn v. Mayor and Council of City of Wilmington*, 8 Storey 569, 598-99, 58 Del. 569, 212 A.2d 596 (Del.Super. 1965). At common law, there was no offense known as Disorderly Conduct, 27 C.J.S., § 1(1), page 507 and 12 Am.Jur.2d, page 684; see also Vol. 2, Wharton Cr. Law and Procedure, § 805. It is an offense only if made so by statute or ordinance, 27 C.J.S., page 507 and 12 Am.Jur.2d, page 684.

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peace is not limited to behavior prohibited by the disorderly conduct statutes.” *Id.* § 1.²⁹

The Arizona Supreme Court has also held that disorderly conduct was not jury-eligible at common law.³⁰

I find no common law antecedents to the present-day offenses of criminal damage or threatening or intimidating.

Moreover, authorities have noted that regarding summary trials before English magistrates:

Violations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, “cheats,” gambling, swearing small thefts, assaults, offenses to property . . . and disorderly conduct were largely in the justices’ hands
(emphasis added).³¹

This passage was taken from an article written in 1926 by then-future Justice Felix Frankfurter and Thomas Corcoran. This article has been cited by the Supreme Court with approval.³²

From these authorities, I conclude that though misdemeanor jury trials regularly occurred in Arizona prior to and at the time of statehood, such jury trial were held pursuant to statutory authority. There are no common law antecedents to the crimes charged that would entitle a defendant to a jury trial in Arizona.

(3) The Legislature Did Not Confer a Jury Trial Right in 1973

Petitioner asserts that the most recent amendment to Article II, Section 23 of the Arizona Constitution requires that this court accept jurisdiction and order the trial court to provide Petitioners with jury trials. Article II, Section 23 previously provided that:

The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number of less than twelve in courts not of record, and for a verdict by nine or more jurors in civil

²⁹ *State v. Chavez*, 208 Ariz. 606, 609, 96 P.3d 1093, 1096 (App. 2004).

³⁰ *State ex. rel. Baumert v. Superior Court In and For Maricopa County*, 127 Ariz. 152, 153-54, 618 P.2d 1078, 1079-80 (1980).

³¹ Frankfurter and Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv.L.Rev. 917, 922, 928 (1926).

³² See, e.g., *Baldwin v. New York*, 399 U.S. 66, 68 n.5 80 S.Ct. 1886, 26 L.Ed.2d 437 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 159 n.31, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

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cases in any court of record and for waiving of a jury in civil cases where the consent of the parties interested is given thereto.

On November 7, 1972, Proposition 104 amended Article II, Section 23, to convey the right to a jury trial in all criminal offenses. Article II, Section 23, as amended in 1972, currently provides that:

The right of a trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Specifically, the Petitioner requests that this Court look to the plain language of the amendment by giving the words their obvious and ordinary meaning. The Petitioner argues that the amended Article II, Section 23 makes no distinction between misdemeanor, felonies, or petty offenses and that, therefore, the electorate clearly chose to provide a jury “in *all* criminal cases.” Thus, the Petitioner urges this Court to apply the literal meaning of “all criminal cases” to this case. Such an interpretation, however, is wholly contrary to Arizona case law.

Arizona case law is clear with regard to the construction and application of the current Article II, Section 23. This section does not give the right to a jury trial but guarantees preservation of such right. In other words, the right is applicable only where it existed under common law at time this section was adopted.³³ The constitutional guarantee of a trial by jury is not a grant, but a reservation of a pre-statehood right. Thus, only those offenses linked to jury trial at common law at the time the constitution was adopted are protected by the constitutional guarantee.³⁴

In addition, it is well established that the right to a jury trial possessed by criminal defendants under the Arizona Constitution does not apply to petty offenses.³⁵ Only the right to a jury trial for serious offenses has been preserved for criminal defendants by both the federal and state constitutions, rendering serious offenses jury trial eligible while petty offenses are not.³⁶ Therefore, Article II, Section 23 does not independently grant a right to a jury trial to all criminal defendants, but reserves the right to a jury trial for those accused of serious offenses.³⁷

³³ *Goldman v. Kautz*, 111 Ariz. 431, 531 P.2d 1138 (1975); *Rothweiler v. Superior Court of Pima County*, 100 Ariz. 37, 410 P.2d 479 (1966); *State v. Cousins*, 97 Ariz. 105, 397 P.2d 217 (1964); *Brown v. Greer*, 16 Ariz. 215, 141 P. 841 (1914).

³⁴ *Benitez v. Dunevant*, 198 Ariz. 90, 7 P.3d 99 (2000).

³⁵ *Id.*

³⁶ *Raye v. Jones*, 206 Ariz. 189, 76 P.3d 863 (App. 2003).

³⁷ *Derendal v. Griffith*, 104 P.3d 147, 150 (2005).

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Likewise, a defendant has no constitutional right to a trial by jury for misdemeanor assault charges in Arizona.³⁸

In sum, the Court is unable to find any case law or legislative history that would indicate that Article II, Section 23 mandates a jury trial for an assault misdemeanor or disorderly conduct offense. However, this Court does acknowledge the importance of the preservation of a jury trial right where such right exists. As Justice Scalia recently noted:

That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.³⁹

In this case, however, the Court is unable to find any preservation of such a right as it existed at common law for misdemeanor offenses.

5. Conclusion

I find that Arizona law does not provide a constitutional right to a jury trial for the misdemeanor offenses charged in this case, and that the Respondent Judge did not err in denying the Petitioner's motion for jury trial. I further find no common law right to a jury trial for the offenses of assault, disorderly conduct, criminal damage, or threatening or intimidating.

IT IS THEREFORE ORDERED accepting jurisdiction in this Petition for Special Action relief.

IT IS FURTHER ORDERED denying the relief requested.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

³⁸ *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 945 P.2d 1251 (1997); *Bruce v. State*, 126 Ariz. 271, 614 P.2d 813 (1980).

³⁹ *Blakely v. Washington*, 124 S.Ct. 2531, 2538-39, 159 L.Ed.2d 403, 72 USLW 4546 (2004).